



Summary Judgment filed by Third-Party Plaintiff, ADP Marshall, Inc. (“ADPM”). SGA’s motion should be granted because the Hughes Affidavit fails in substantial part to meet the requirement of Fed. R. Civ. P. 56(e), in that it contains facts not based on personal knowledge, hearsay, and fails to show that the affiant is competent to testify to matters stated therein. The portions of the affidavit which must be stricken and the legal authority in support of SGA’s motion are set forth below.

### I. RELEVANT FACTS

This matter arises out of the construction of the Advanced Technology and Manufacturing Center in Fall River, Massachusetts (the “Project”). The plaintiff is the Project owner and retained ADPM to serve as the Project’s design/build contractor. See Amended Third-Party Complaint at ¶ 6. ADPM entered into an agreement with SGA pursuant to which SGA agreed to provide core and shell architectural services and structural foundation design services. See SGA Agreement, Attachment A, p. 1

On or about December 29, 2003, the plaintiff brought a Complaint against ADPM for alleged deficiencies with the HVAC system and windows. See Complaint ¶¶ 23; 27. Shortly thereafter, ADPM brought a Third-Party Complaint against its various subcontractors and subconsultants, including SGA. See Third-Party Complaint. In its Third-Party Complaint, ADPM makes no specific allegations against SGA except that SGA is obligated to defend ADPM against the plaintiff’s claims as they relate to SGA’s work on the Project. See Third-Party Complaint, ¶ 118.

ADPM has filed a motion for summary judgment on its claims against SGA. In support of its motion, ADPM has submitted the Affidavit of Tom Hughes. The Affidavit

of Tom Hughes contains hearsay which, SGA respectfully requests that this Court strike those as inadmissible.

## **II. LEGAL STANDARD**

For an affidavit to be considered evidence in a summary judgment proceeding, it must be based on personal knowledge and show that the affiant is competent to testify in the matter stated in the affidavit. Fed. R. Civ. P. 56(e); See also Perez v. Volvo Car Corp., 247 F.3d 303, 316 (1st Cir. 2001)(portions of affidavit made without requisite personal knowledge stricken). To be admissible, an affidavit must also “set forth such facts as would be admissible in evidence.” Fed. R. Civ. P. 56(e). Inadmissible hearsay “cannot be considered on a motion for summary judgment.” Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). If an affidavit presented in connection with a motion for summary judgment does not comply with the above-stated requirements, it is subject to a motion to strike. International Ship Repair & Marine Servs., Inc. v. St. Paul Fire & Marine Ins. Co., 906 F.Supp. 645, 648 (M.D. Fla. 1995).

## **III. ARGUMENT**

The Hughes Affidavit should be stricken for failing to comply with the requirements of 56(e). Hughes does not establish that he has personal knowledge of the matters stated within his affidavit. Nor does Hughes show that he is competent to testify as to the matters stated within his affidavit. Hughes alleges that he is “an employee of ADP Marshall, Inc.,” yet he does not describe his work duties or how he became acquainted with the matters to which he testifies. See Hughes Aff. at ¶ 1. Likewise, Hughes’ general statement that he “had the opportunity to review the project records, the documents produced in this litigation and to visit the Project on several occasions to

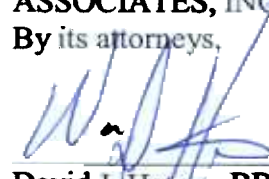
ascertain and understand the MDFA's allegations" does not suffice. See Affidavit ¶ 3. In order to be admissible, the Hughes Affidavit must "cite specific concrete facts establishing the existence of the truth of the matter asserted." Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 887 (7th Cir. 1998)(affirming exclusion of affidavit that makes broad assertions as to another's actions without personal knowledge), quoting Hadley v. County of Du Page, 715 F.2d 1238, 1243 (7th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). Such vague assertions do not suffice; Fed. R. Civ. P. Rule 56 "demands something more specific than the bald assertion of general truth of a particular matter." Id.

In paragraphs 4, 6, 7, 10, and 14, Hughes attempts to characterize a number of different documents. Rather than stating facts based on personal knowledge, Hughes is simply repeating and providing his subjective opinion regarding what is contained in the various documents. In paragraphs 5, 8, and 9, Hughes alleges that a number of events have occurred. As demonstrated above, these facts are obviously not based on Hughes' personal knowledge and, therefore, they constitute inadmissible hearsay. Finally, Hughes' reference to the "Spagnolo/Gisness consulting agreement" is inadmissible hearsay because the Spagnolo/Gisness consulting agreement has not been authenticated.

#### **IV. CONCLUSION**

Based on the foregoing, Spagnolo/Gisness & Associates, Inc., respectfully requests that the Court strike and disregard the foregoing portions of the Affidavit of Tom Hughes for purposes of adjudicating ADPM's Motion for Summary Judgment.

Respectfully submitted,  
SPAGNOLO GISNESS &  
ASSOCIATES, INC.,  
By its attorneys,



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**CERTIFICATE OF SERVICE**

I, Warren D. Hutchison, Esquire, hereby certify that on this 14<sup>th</sup> day of June, 2005, I served the attached *Memorandum in Support of Motion to Strike Affidavit of Tom Hughes* by mailing a copy thereof, postage pre-paid to:

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